

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

EUGENE SHANNON ABNER #642616 §
v. § CIVIL ACTION NO. 9:08cv12
WARDEN DAVID SWEETIN, ET AL. §

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE
AND ENTERING FINAL JUDGMENT

The Plaintiff Eugene Abner, proceeding *pro se*, filed this civil rights lawsuit under 42 U.S.C. §1983 complaining of alleged violations of his constitutional rights. This Court ordered that the case be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

Abner's complaint, while largely unclear, appears to raise issues concerning the validity of his conviction and imprisonment, allegations that someone is trying to steal his identity, and claims that his legal mail is being tampered with and that someone is "making false statements under his name." For relief, Abner asked that his criminal case be "investigated" and that he be allowed to go home.

After review of the pleadings, the Magistrate Judge issued a Report on March 13, 2008, recommending that the lawsuit be dismissed. The Magistrate Judge observed that Abner had failed to comply with an order to correct his application for leave to proceed *in forma pauperis*, but did not base the recommendation for dismissal upon this fact. Instead, the Magistrate Judge said, Abner has filed at least three lawsuits or appeals which have been dismissed as frivolous or for failure to state a claim upon which relief may be granted, and he therefore falls under the bar set forth in 28 U.S.C. §1915(g), which prohibits prisoners from proceeding under the *in forma pauperis* statute unless the

prisoner is in imminent danger of serious physical injury. The Magistrate Judge stated that Abner did not pay the full filing fee and that his vague and nebulous allegations that “someone” is trying to kill him and that “someone” is trying to steal his identity are not sufficient to show that Abner is in imminent danger of serious physical injury. Consequently, the Magistrate Judge recommended that Abner’s application for leave to proceed *in forma pauperis* be denied and that the lawsuit be dismissed with prejudice as to its refiling under the *in forma pauperis* statute, but without prejudice as to its refiling upon payment of the full filing fee.

Abner received a copy of the Magistrate Judge’s Report on March 18, 2008, but filed no objections thereto; accordingly, he is barred from *de novo* review by the district judge of those findings, conclusions, and recommendations and, except upon grounds of plain error, from appellate review of the unobjected-to factual findings and legal conclusions accepted and adopted by the district court. Douglass v. United Services Automobile Association, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

The Court has carefully reviewed the pleadings and documents in this case, as well as the Report of the Magistrate Judge. Upon such review, the Court has concluded that the Report of the Magistrate Judge is correct. It is accordingly

ORDERED that the Report of the Magistrate Judge is hereby ADOPTED as the opinion of the District Court. It is further

ORDERED that the Plaintiff’s application for leave to proceed *in forma pauperis* (docket no. 2) is DENIED. It is further

ORDERED that the above-styled civil action be and hereby is DISMISSED with prejudice as to the refiling of another *in forma pauperis* lawsuit raising the same claims as herein presented, but without prejudice to the refiling of this lawsuit without seeking *in forma pauperis* status and upon payment of the statutory \$350.00 filing fee. It is further

ORDERED that should the Plaintiff pay the full filing fee within 15 days after the date of entry of final judgment in this case, he shall be allowed to proceed in the lawsuit as through the full fee had been paid from the outset. Finally, it is

ORDERED that any and all motions which may be pending in this action are hereby DENIED.

So **ORDERED** and **SIGNED** this **14** day of **April, 2008**.

A handwritten signature in black ink, appearing to read "Ron Clark", is written above a horizontal line.

Ron Clark, United States District Judge